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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SHI'A ASSOCIATIONS OF BAY AREA, INC.; *et al.*, Plaintiffs, v. MICHAEL CHERTOFF, Secretary of the Department of Homeland Security; *et al.*, Defendants.	No. C 07-3328 JW **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE; DECLARATIONS OF JOSEPH FIERRO AND ILA DEISS** Hearing Date: July 30, 2007 Time: 9:00 a.m.

I INTRODUCTION

Plaintiff Shi'a Association of the Bay Area (SABA), a local religious organization, and their religious leader, Dr. Nabi Raza Mir (Dr. Mir), a native and citizen of India, and his family, have brought this immigration action for declaratory, injunctive and mandamus relief under the Administrative Procedure Act (APA) and the First and Fifth Amendments to the United States Constitution. *See* Complaint at 8. At this juncture, Plaintiffs seek to preliminarily enjoin Defendants from continuing to calculate Dr. Mir and his family's unlawful presence in the United States that they have been accruing since January 1, 2007, when Dr. Mir fell out of lawful status in

the United States.[1] Plaintiffs also ask the Court to direct Defendants to accept Dr. Mir's applications for adjustment of status (Form I-485) to that of legal permanent resident, and to order Defendants to immediately adjudicate Dr. Mir's request for employment authorization. *See* Complaint at 28-29.

On June 29, 2007, the Court granted Plaintiffs' motion for a temporary restraining order, restraining Defendants from "counting the period of time between June 28 and July 23, 2007 against the Plaintiffs in calculating the period for which they have been 'unlawfully present.'" June 29, 2007 Order at 2.[2] The Court further directed Defendants to appear on July 23, 2007, subsequently changed to July 30, 2007, and show cause why a preliminary injunction should not be entered restraining Defendants from accruing against the individual Plaintiffs days of "unlawful presence" in the United States during the pendency of this action. *Id.* Defendants hereby oppose the motion for preliminary injunction and respond to the Court's Order to Show Cause.

II. FACTUAL BACKGROUND

In February 2002, Dr. Mir entered the United States on a R-1 non-immigrant religious worker visa. In 2004, United States Citizenship and Immigration Services (USCIS) renewed the R-1 visa status until January 1, 2007. On April 12, 2005, SABA filed a Form I-360 Petition for Special Immigrant with the USCIS on behalf of beneficiary Dr. Mir and his family.[3] *See* Declaration of Joseph Fierro ("Fierro Decl.") ¶ 4.

On September 8, 2006, when USCIS still had not adjudicated the Form I-360 visa petition, SABA filed a Complaint for Mandatory Relief, asking that this Court compel USCIS to adjudicate the Form I-360 Petition within 30 days. *See Shi'a Association of the Bay Area v. Chertoff*, No. C

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[1]Plaintiffs argue that the period of "unlawful immigration status" under INA § 245(c)(2), 8 U.S.C. § 1255(c)(2), and the period of "unlawful presence" under INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B), should be tolled pending this litigation.

[2]The July 23, 2007 date was presumably extended to July 30, 2007, when the hearing date was moved by the Court.

[3]An "I-360" Form refers to a Petition for Special Immigrant that an employer files on behalf of a religious worker in order to enable that non-citizen to receive an immigrant visa pursuant to Immigration and Nationality Act (INA) § 203(b)(4), 8 U.S.C. § 1153(b)(4).

06-5515 JW. On November 13, 2006, USCIS conducted a site check of the SABA's premises in San Jose, and interviewed Dr. Mir. *See* Fierro Decl. ¶ 4. On December 29, 2006, the Form I-360 was denied, and on January 30, 2007, an administrative appeal was filed with the USCIS's Administrative Appeals Office (AAO).[4] Without an approved Form I-360, Plaintiff Mir and his family began to accrue unlawful presence in the United States on January 1, 2007, when Dr. Mir's R-1 visa expired.

On May 29, 2007, after Dr. Mir and his family had already accrued nearly five months of unlawful presence in the United States, SABA filed a second Form I-360 visa petition on behalf of Dr. Mir. In addition to the Form I-360, Dr. Mir concurrently filed a Form I-485 application for adjustment of status to legal permanent resident and a Form I-765 application for employment authorization. *See* Fierro Decl. ¶ 5. On June 6, 2007, the USCIS rejected and returned the Form I-485 adjustment application and I-765 employment application, citing to the first I-360 that was still pending before the AAO, and citing regulation 8 C.F.R. § 235.2(a)(2)(i)(B), which does not allow concurrent filings in religious worker petitions.[5] *See* Fierro Decl. ¶ 5.[6] Only after Dr. Mir has an approved Form I-360 would USCIS have the basis to accept his application for adjustment of status. *See* 8 U.S.C. 1255(a).

On June 25, 2007, Plaintiffs filed the instant Complaint, seeking injunctive and declaratory

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[4]This level of review is sometimes referred to as the Administrative Appeal Unit (AAU).

[5]The second Form I-360 remains pending with USCIS and apparently covers a different time frame than the first petition.

[6]USCIS explains that the Governmental Accountability Office (GAO) NSIAD-99-67 (March 26, 1999) report identified the incidences of fraud in the religious worker program. *See* Fierro Decl. ¶ 8. Allowing religious workers to file concurrently has a higher probability of damaging the integrity of the immigration system because it encourages filings by aliens who are eligible for classification as religious workers, but nonetheless may be able to obtain interim benefits, such as employment or advance travel authorization, while the adjustment applications are pending with USCIS. *See* Fierro Decl. ¶ 9. USCIS requires the adjudication of the I-360 prior to filing of the I-485 to ensure that all religious worker petitions are sufficiently reviewed and adjudicated before any substantive benefits are granted. *See* Fierro Decl. ¶ 10. Up to a 33% fraud rate has been recorded in Form I-360 visa petitions for religious workers. Fierro Decl. ¶ 8.

relief, challenging USCIS's refusal to accept Dr. Mir's I-485 adjustment of status and employment authorization applications on June 6, 2007, which they had attempted to concurrently file with the second Form I-360 petition on May 29, 2007. Plaintiffs challenge the regulation that prohibits concurrent filings of visa petitions for religious workers and adjustment of status applications. Plaintiffs allege a violation of their Due Process, Equal Protection and right to religious freedom. See Complaint at 1-3.

On July 25, 2007, USCIS again denied the remanded Form I-360 petition and certified that decision to the AAO. Deiss Decl., Exhibit A. Dr. Mir and his family accrued unlawful presence in the United States from January 1, 2007, until Defendants were restrained by the Court on June 29, 2007, two days short of the 180th day. If Dr. Mir and his family fail to timely depart the country, they will be barred from returning to the United States for between 3 and 10 years. *See* 8 U.S.C. 1182(a)(9)(B).

III. ARGUMENT

A. Legal Standard

"The standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties." *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). The Ninth Circuit has two different criteria for determining whether preliminary injunctive relief is warranted. "Under the traditional criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to [the] plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (internal quotations omitted). The Ninth Circuit also uses an alternative test whereby a court may grant the injunction if the plaintiff demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in his favor. *See id.*

"The two alternative formulations 'represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not

separate tests but rather outer reaches of a single continuum.'" *Raich v. Gonzales*, --- F.3d ----, 2007 WL 754759 (9th Cir. Mar. 17, 2007) (*quoting Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998)).

B. Plaintiffs' Have Not Demonstrated Irreparable Harm

In its June 29, 2007 order granting Plaintiffs' request for a restraining order, the Court found that Plaintiffs "are faced with a choice: effectively abandon their appeal and voluntarily depart from the United States prior to the 180th day, or remain in the United States to continue to pursue their appeal and risk adverse consequences caused by staying beyond the 180th day." Order at 2. This is incorrect. There is a regulation that provides that travel outside of the United States by a Form I-485 applicant for adjustment of status shall be deemed an abandonment of the application if he or she was not previously granted advance parole by USCIS for such absences. 8 C.F.R. § 245.2(a)(4)(ii)(B). However, there is no such provision for Form I-360 petitioners and Dr. Mir and his family may return to their native country while continuing to pursue their second administrative appeal. There is nothing barring them from pursuing this action from abroad too. While perhaps inconvenient, the family is by no means irreparably harmed. If the AAO overturns UCIS's second decision to deny the Form I-360 petition, Dr. Mir and his family may either seek consular processing or may return to the United States and at that point will have a basis to apply for adjustment of status to that of legal permanent residents. See 8 U.S.C. § 1255(a). Moreover, Plaintiffs waited until nearly 150 of the 180 days of unlawful presence had accrued before attempting to file an adjustment of status application along with a second Form I-360 petition, creating a self-imposed emergency. Dr. Mir could have timely departed without accruing unlawful presence.

C. Plaintiffs Have Not Established a Strong Likelihood of Success on the Merits

To the extent Plaintiffs may attempt at this point to challenge the merits of the agency's denial of SABA's Form I-360 petition, this Court lacks jurisdiction to consider any such claims under the APA because Plaintiffs have not exhausted their administrative remedies as the decision was certified to the AAO on July 25, 2007 and remains pending with the AAO. Under the doctrine of exhaustion of administrative remedies, a party may not seek judicial review of an adverse

administrative decision until the party first pursues all possible relief within the agency. *See Young v. Reno*, 114 F.3d 879, 881 (9th Cir. 1997)(citation omitted).

Further, to the extent Plaintiffs are challenging USCIS's regulation that bars concurrent filing of Form I-360 petition with Form I-485 Adjustment of Status Applications, promulgated because of high levels of fraud in religious worker applications, 8 U.S.C. § 1252(a)(2)(B)(ii), which, as amended by the REAL ID Act of 2005, Pub.L. No. 109-13, 119 Stat. 231 (2005) ("REAL ID Act"), on May 11, 2005, provides that "[n]otwithstanding any other provision of law ... and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review" any discretionary action by the Attorney General or the Secretary of Homeland Security other than the granting of asylum under section 208(a) of the INA, 8 U.S.C. § 1158(a). Section 1255(a) provides that: "[t]he status of an alien who was inspected and admitted or paroled into the United States ... may be adjusted by the Attorney General, *in his discretion* and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence[.]" 8 U.S.C. 1255(a) (emphasis added). Therefore, USCIS's decision not to accept SABA second Form I-360 (filed with USCIS while his first I-360 was on appeal to the AAO) concurrently with Dr. Mir's application for adjustment of status was purely within the agency's discretion and not subject to review.

In order to establish jurisdiction, Plaintiffs rely on an unpublished decision out of the Western District of Washington, *Hillcrest Baptist Church v. United States*, Slip Copy, 2007 WL 636826 (W.D.Wash. Feb. 23, 2007). Firstly, the Hillcrest court found that the relevant jurisdictional bars were not raised by Defendants and therefore, the court made jurisdictional findings as unopposed. 2007 WL 636826, *6. Secondly, Plaintiffs in Hillcrest had an approved Form I-360 and the court was reviewing the ultimate denial of the Form I-485 adjustment applications because plaintiffs had accrued more than 180 days unlawful presence and were already barred from reentry into the United States. This is not the case here.

Here, Plaintiffs have no approved Form I-360 and, therefore, USCIS has no basis for accepting Form I-485 adjustment of status applications. *See* 8 U.S.C. 1255(a) (which requires that an applicant be eligible to adjust their status). Moreover, to add another wrinkle to the matter, the

Department of State has declared that there are no more visas available for this fiscal year. See Deiss Decl., Exh B.; *see also* 8 U.S.C. § 1151(d) (placing a numerical limitation upon the number of employment based visas allowed in any given fiscal year). Relief at this juncture is therefore unavailable under the Administrative Procedure Act.

Finally, to satisfy the requirements of constitutional standing, "the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Mujahid v. Daniels*, 413 F.3d 991, 994 (9th Cir. 2005) (*citing Spencer v. Kemna*, 523 U.S. 1, 7 (1998)). Furthermore, the injury must be: (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical. *See United States v. Antelope*, 395 F.3d 1128, 1132 (9th Cir. 2005). Again, unlike the plaintiffs in *Hillcrest*, Plaintiffs are free to voluntarily depart the United States and may pursue the second appeal of the denial of the Form I-360 petition from abroad without repercussions so long as they depart prior to the expiration of the 180 days. Any past injury is hypothetical and any future injury would be self imposed. Plaintiffs arguments under the First Amendment completely undermine the Immigration and Nationality Act and the necessary requirements to qualify for relief under the Act.

IV. CONCLUSION

Plaintiffs have neither established a combination of probable success on the merits and the possibility of irreparable injury, nor that serious questions are raised and the balance of hardships tips sharply in their favor. Accordingly, the Court should deny the motion for preliminary injunction.

Dated: July 27, 2007

Respectfully submitted,

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